

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES PETERSON,

Plaintiff-Appellant,

v

CONSUMERS ENERGY,

Defendant-Appellee.

UNPUBLISHED

July 5, 2005

No. 255560

Jackson Circuit Court

LC No. 01-003214-CZ

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

HOEKSTRA, J., (*concurring in part and dissenting in part*).

I agree with the majority's conclusions that plaintiff's disparate treatment claim was improperly dismissed based on the preemptive effect of § 301 of the Labor Management Relations Act, 29 USC 141 *et seq.*, but that dismissal ultimately was proper because plaintiff failed to establish an actionable claim. However, I respectfully disagree that the trial court improperly dismissed plaintiff's hostile work environment claim.

At issue regarding plaintiff's claim for hostile work environment is whether plaintiff was subjected to unwelcome communication or conduct based on his race and, if so, whether this communication or conduct was sufficiently severe or pervasive to create a hostile work environment. See *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996). To be subject to unwelcome communication or conduct, plaintiff must be aware of it; plaintiff cannot rely on instances of alleged racial conduct or communication of which he was not aware. See, e.g., *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich app 309, 317; 385 NW2d 778 (1986). Thus, although there is evidence of incidents of discrimination and hostile work environment experienced by a number of others at the plant,¹ the proper focus is on

¹ I note that this evidence arises, in part, from the peculiar procedural history of this case. Plaintiff's claims were originally filed, along with the claims of seventeen other minority plaintiffs, as part of a single multi-plaintiff case. However, the trial court ordered the claims severed into individual actions for each plaintiff. Afterward, eighteen individual actions, including this case, were re-filed, but each of the individual complaints that were filed was identical to the original multi-plaintiff complaint; only the caption was changed to omit the names of the other individual plaintiffs. No effort was made to individualize the complaints to the circumstances of the named plaintiff.

plaintiff's own deposition testimony about the communication and conduct of which he was either aware or to which he was himself subjected. *Id.*

In his deposition testimony, plaintiff indicated that he had seen and was required to clean up graffiti that included racial slurs, that he was aware that a supervisor had used the word "nigger" in a conversation with another employee, that he was aware that a supervisor had used a racially offensive name in referring to a coworker, and that he had heard that word used during an altercation involving two contractors. Plaintiff also indicated that he was aware that a noose had been found in the fabrication shop, that a security guard had made a noose that was found at the plant in the summer of 2002, and that he was aware of several other nooses being found, but did not see those nooses himself.

Whether an environment is hostile is to be determined by looking at all of the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating or is merely comprised of "offensive utterances," and whether it unreasonably interferes with an employee's work performance. *Quinto, supra* at 370 n 9, citing *Harris v Forklift Systems, Inc.*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993). This Court has previously held that, to be actionable, a hostile work environment must be shown to have affirmatively manifested itself to the complaining party or parties, and be "sufficiently severe and persistent to affect seriously the psychological well being' of the employees in question." *Langlois, supra*. On the facts of this case, I agree with the trial court that plaintiff failed to present evidence of the affirmative manifestation of sufficiently severe or pervasive conduct to allow a reasonable person to find that plaintiff was himself subjected to a racially hostile work environment. *Id.* Consequently, I would affirm the trial court's grant of summary disposition of plaintiff's hostile work environment claim.

/s/ Joel P. Hoekstra